NO. 89-506

IN THE

Supreme Court of the United States

October Term, 1988

VIRGINIA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

and

AARON WHEELER, Petitioners,

vs.

EDDIE UPCHURCH, Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

I

In the Commonwealth of Virginia where fundamental state law has always secured to white citizens the right to teach, preach, write or speak any pure expression of opinion, however ill-founded, without inhibition by actions for libel and slander and where, as an incident of slavery, black persons were statutorily forbidden, under penalty of the lash, to use provoking language to a white person,

Does federal law mandate summary dismissal of a white plaintiff's libel action against a black defendant when, by the plaintiff's responses to interrogatories and to requests for admissions, it has been established that the action is predicated solely on the defendant's pure expression of opinion in a matter of public concern?

II

If in such case summary dismissal has been refused by the state court, does the defendant have the right, in light of Fleming I[1] and its sequela[2], to timely remove the action to federal court?

THE PARTIES TO THE PROCEEDING IN THE COURT BELOW

The petitioners are Virginia State Conference of the National Association for the Advancement of Colored People and Aaron Wheeler, a citizen of Virginia Beach, Virginia, who is black.

The respondent is Eddie Upchurch, a citizen and police officer of Virginia Beach, Virginia, who is white.

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[1]Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981) (Fleming I).

[2]Including Fleming v. Moore, sub nom, The Gazette v. Harris, 229 Va. 1, 325 S.E.2d 713 (1985) (Fleming II)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Virginia State Conference of the National Association for the Advancement of Colored People and Aaron Wheeler, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 6, 1989.

OPINIONS BELOW

The "unpublished", per curiam, opinion of the United States Court of Appeals for the Fourth Circuit is set out in the appendix at pages 1 through 5. The unpublished memorandum of the District Judge is set out in the appendix at pages 6 through 18.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed is dated and was entered July 6, 1989 by the United States Court of Appeals for the Fourth Circuit. (App. 18-19)

Title 28 United States Code, Section 1254(1) confers jurisdiction to review the judgment by writ of certiorari.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution Of The United States:

Amendment XIII

Section 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Section 1.

*** No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Civil Rights Act of 1866 (14 Stat 27)

An Act to Protect all Persons in the United States in their Civil Rights and furnish the Means of their Vindication
[April 9, 1866]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

* * *

SEC. 3. And be it further enacted, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance . . . of

all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, . . ., such defendants shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. * * *

Title 28 U.S.C. 1443
Civil Rights Cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

Title 28 U.S.C. 1447
Procedure After Removal Generally

* * *

(d) An order remanding a case to the State court from which it was removed

is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Title 42 U.S.C. 1981.
Equal Rights Under the Law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Constitution Of Virginia

Article I, Section 12

Freedom of speech and of the press; right peaceably to assemble, and to petition. - That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

STATEMENT OF THE CASE

Pursuant to 28 U.S.C. Section 1443, Aaron Wheeler and The Virginia State Conference of the National Association for the Advancement of Colored People undertook to remove to the United States District Court for the Eastern District of Virginia the action for alleged defamation which Eddie Upchurch had brought against them in the Circuit Court of the City of Virginia Beach. In their petition for removal, filed on 19 September 1988, (App. 25), the petitioners (defendants in the defamation action) asserted that, "solely by reason of race and color, and in violation of Title 42 United States Code, Section 1981, petitioners are denied and cannot enforce in the courts of the State of Virginia the right, under Article I, Section 12 of the Constitution of Virginia, as construed in Chaves v. Johnson, 230 Va. 112, 119, 335 S.E.2d 97,

101-2 (1985), 'to teach, preach, write or speak any [pure expression of] opinion, however ill-founded, without inhibition by actions for libel and slander', and the concomitant right to have the court, in advance of trial, 'determine as a matter of law whether [the] allegedly libelous statement[s are assertions] of fact or [expressions] of opinion'". (App. 32-33)

Further, the petitioners asserted that notwithstanding the Thirteenth Amendment to the Constitution of the United States and Section 1981 of Title 42 of the United States Code, the courts of Virginia and, particularly, the highest court of the State of Virginia tolerate the lingering viability of the 1847-48 Act of the General Assembly of Virginia, concerning Offenses By Negroes wherein, inter alia, it was ordained:

> "A negro shall be punished with stripes: First, if he use provoking language or menacing gestures to a white person."

Here, the failure of the court to rule whether Wheeler's assertions were fact or opinion subjects the petitioners to the onus of preparation and trial, and to the risk of an adverse verdict and judgment, for having made pure expression of opinion, such as white citizens may freely make without inhibition by actions for libel and slander. (App. 33-34)

By order dated 27 September 1988 and filed on 28 September 1988, the district judge, on his own motion, held that the petition for removal was not timely and remanded the matter to the state court. (App. 20)

Motion to reconsider and to alter judgment was timely filed. (App. 21) In that motion the petitioners informed the federal court that their absolute inability to enforce in the courts of the state their right under Article I section 12 of the Constitution of Virginia to

freely express any opinion, however ill-founded, without inhibition by actions for libel or slander, had become certain on 20 September 1988, when the Supreme Court of Virginia denied the defendants' 15 September 1988 petition for a writ of mandamus (App. 64) by which the Circuit Court of the City of Virginia Beach would be ordered to rule, as a matter of law, whether the alleged utterances of Aaron Wheeler were statements of fact or expressions of opinion.

On 3 November 1988, the district court entered and filed its memorandum opinion and order, denying the motion to reconsider. (App. 6-18). The district judge conceded that the petition for removal had been filed within 30 days from the petitioner' receipt of the state judge's (Judge Spain's) letter informing counsel that the motions of the defamation defendants for summary judgment would be

denied. (App. 9) Moreover, the district judge considered that the statutory term "other paper" (28 U.S.C. Section 1446(b)) may be ambiguous enough to include the state judge's letter (App. 10), if from that letter it could be ascertained that the case had become removable (App. 11).

The federal district judge perceived that the defendants were "arguing that by issuing the letter, Judge Spain indicated his intention to deprive defendants of their civil rights under Section 1981 by subjecting them to trial based on their expressions of opinions, a trial which would not have occurred if defendants where white." (App. 12-13. Emphasis added). The petition for removal did not address the "intention" of the state trial judge; it alleged that, by his "failure . . . to rule whether Wheeler's assertions where fact or opinion", he had already subjected the petitioners "to the onus of

preparation and trial, and to the risk of an adverse verdict and judgment, for having mad[e] pure expression of opinions, such as white citizens may freely make without inhibition by actions for libel and slander." (App. 34; Petition for Removal ¶ 9)

The holding of the district judge was that the removal petitioners do not point to "a formal expression of state law" which denies or prevents their enforcing in the state court their "specified federal rights" to the full and equal benefit of the privilege under Article 1, Section 12 of the Constitution of Virginia to write or speak any pure expression of opinion, however ill-founded, without inhibition by actions for libel or slander. (App. 13-17)

Far wider of the mark was the finding of the court of appeals that the "core" of the argument of the petitioners

"is that a black person cannot receive a fair interpretation of the libel laws of Virginia in adversarial confrontations against a white person." (App. 4) Affirmance of remand, however, was predicated on the holding of the district judge that the instant petitioners did not present "concrete evidence to prove that Virginia case law discriminates against black defendants in defamation cases" (App. 5), e.g., "a state statute . . . deny[ing] defendant's rights before trial" (App. 16-17).

Statement of the Facts

On 20 June 1987, at approximately 2:00 a.m., Eddie Upchurch, a police officer of the City of Virginia Beach who is white, shot and killed Fred T. Gilchrist, III, an unarmed, 22 year old black man. (App. 40-42). On and after 24 June 1987, Aaron Wheeler (then the

Chairman of the Legal Redress Committee of the Virginia Beach Branch of the National Association for the Advancement of Colored People) was quoted in the local press, i.e., in the Virginia-Pilot/Ledger Star newspapers, as having characterized the homicide as "murder" or as "senseless murder" and as having insinuated that the shooting was racially motivated. (App. 42-43, 47). Wheeler was not, and he never claimed to have been, a witness to the shooting or to anything which, as part of the res gestae, had preceded or followed the shooting. (App. 28).

According to the plaintiff's bill of particulars (consisting principally of newspaper articles which are not reproduced here), the plaintiff's response to the request for admissions, and the plaintiff's response to interrogatories (App. 50-57), the alleged statements, if made, were in contexts as next shown:

> At that point Fred Gilchrist came out and told police to leave his sister alone, Wheeler said, and began wrestling with a police officer. Wheeler did not specify which officer.
>
> Gilchrist's sister then allegedly shouted, "Don't shoot my brother!"
>
> Wheeler said that, at that point, Upchurch had his gun drawn and fired at Gilchrist, who fell to his knees and then to his face. He died moments later.
>
> "This is a senseless murder, and something has to be done about it", Wheeler charged.

(The Virginia-Pilot, June 24, 1987)

> Wheeler, invoking harsh language that he once used but later toned down, again called the shooting "murder".
>
> "Gilchrist did not touch the gun," Wheeler said. "It showed he was murdered by the police officer. And I'm going to use that word. Murder. It was brought out that he did not touch that gun. There was no powder in his hands. No fingerprints on the gun."

The Virginia Pilot July 1, 1987.

The context in which the characterization of the homicide as murder was allegedly made is further revealed by

subsequent paragraphs of the last cited newspaper article, viz:

> "Upchurch [the instant plaintiff police officer] in his statement said he felt pressure on his gun, leading him to believe that Gilchrist was trying to take it.
>
> "In an effort to prevent that from happening" Sciortino [attorney for the Commonwealth] said, Upchurch "grabbed his weapon and in the ensuing struggle he unintentionally discharged" the gun. The bullet struck Gilchrist in the chest. He fell to his knees and died.
>
> Other witnesses, including the three youths, Turner and Maxine Gilchrist, said Fred Gilchrist's hand was not on Upchurch's gun.
>
> "No fingerprints other than those of Officer Upchurch were found on his weapon," Sciortino said.
>
> The medical examiner's findings "tend to corroborate' witnesses statements that the gun was 'intentionally fired'" Sciortino said.
>
> "In addition, the results of the gunshot residue test done on the victim's hand do not support the assertion that the victim had his hand on the officer's gun at the time it was discharged," Sciortino said.

Summary of the Argument

Deleting therefrom the words "indicated his intention to", the petitioners, in their brief in the court of appeals, adopted language of the district judge, viz: "[D]efendants are arguing that, by issuing the letter, Judge Spain . . . deprive[d] defendants of their civil rights under Section 1981 by subjecting them to trial based on their expressions of opinion, a trial that would not have occurred if defendants were white." (App. 12-13)

"[S]olely by reason of race and color . . . petitioners are denied and cannot enforce in the courts of the State of Virginia the right, under Article I, Section 12 of the Constitution of Virginia, as construed in Chaves v. Johnson, 230 Va. 112, 119, 335 S.E.2d 97, 101-2 (1985), 'to teach, preach, write or speak any [pure expression of] opinion,

however ill-founded, without inhibition by actions for libel and slander', and the concomitant right to have the court, in advance of trial, 'determine as matter of law whether [the] allegedly libelous statement[s are assertions] of fact or [expressions] of opinion.'" (App. 32-33; Petition for Removal ¶ 8).

"Notwithstanding the Thirteenth Amendment to the Constitution of the United States and Section 1981 of Title 42 of the United States Code, the courts of Virginia and, particularly, the highest court of the State of Virginia, tolerate the lingering viability of the 1847-48 Act of the General Assembly of Virginia concerning Offenses by Negroes wherein, inter alia, it was ordained:

> "A negro shall be punished with stripes: First, if he use provoking language of menacing gestures to a white person."

(App. 33-34, Petition for Removal ¶ 9).

More effectively than a facially unconstitutional statute ever could, the holdings in Fleming I, supra, standing in stark contrast with Chaves v. Johnson, supra, and Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 334 S.E.2d 846 (1985), "authorize" trial courts in Virginia to "try" and (in accordance with a jury's verdict) to punish a black person for "provoking" a white person by "pure expressions of opinion", even in matters of public concern.

REASONS FOR ALLOWANCE OF THE WRIT

I

The Courts Below Quoted And Then Distorted The "Core" Of The Petitioners' Case

The district court accurately stated the petitioners' case in these words: "Defendants claim that 28 U.S.C. 1443(1) applies because:

> "Defendants are denied and cannot enforce in the courts of the State

> of Virginia the right, under Article 1, Section 12 of the Constitution of Virginia, . . . 'to teach, preach, write or speak any [pure expression of] opinion, however ill-founded, without inhibition by actions for libel and slander and the concomitant right to have the court, in advance of trial, determine as a matter of law whether (the) allegedly libelous statement[s are assertions of fact or expressions] of opinion.'" (App. 11-12)

The court of appeals prefaced its similar quotation from paragraph 8 of the petition for removal (App. 32-33) by noting that petitioners claimed that the state courts' denial was "solely by reason of race and color and in violation of Title 42 United States Code, Section 1981" (App. 3). Here, we have underlined the words "in advance of trial" which the lower courts seem to have overlooked, notwithstanding their being of the very essence of the claimed federal right.

Except for the words "indicated his intentions to", the district court accurately restated the petitioners'

position, viz:

> "Apparently, defendants are arguing that by issuing the letter, Judge Spain . . . deprive[d] defendants of their civil rights under Section 1981 by subjecting them to trial based on their expressions of opinion, a trial that would not have occurred if defendants were white." (App. 12-13).

The lower courts focused on the second prong of the test articulated in Johnson v. Mississippi, 421 U.S. 213, 219 (1975), viz:

> "Second, it must appear, . . . that the removal petitioner is "denied or cannot enforce" the specified federal rights "in the courts of the state." This provision normally requires that the "denial be manifest in a formal expression of state law."

(App.13) They then distorted the petitioners' claims to fit the burden of prophecy which the Johnson petitioners were held not to have successfully carried. By so doing, the lower courts avoided deciding this case in which the state's trial court had already deprived the petitioners of their right to make

pure expression of opinion without inhibition by the pending action for alleged defamation and in which the state's highest court had refused mandamus to compel the trial court to rule whether the alleged utterances were actionable statements of fact or privileged expressions of opinion. Whether a black person can receive a fair interpretation of the libel laws in the courts of Virginia (App. 4) and whether defendants can receive a fair trial in an action for alleged defamation of a white plaintiff (App. 16) are not questions within the scope of the instant petition for removal. The question in this case, stated in language of the district judge, is whether the petitioners should be subjected "to trial based on their expression of opinion, a trial that would not have occurred if defendants were white". (App. 12-13)

II

Federal Law Mandates Summary Dismissal Of This Defamation Action

A

But For The Matter Of Color, The Motion For Summary Judgment Would Have Been Granted

The plaintiff in the action for alleged defamation is a white police officer who had shot and killed an unarmed young black man. Without any semblance of a public trial or inquest, the officer's superiors had disregarded the medical examiner's findings and the finger-print evidence (App. 22) and had ruled that the shooting was "accidental" and, also, that the officer had fired his weapon in self defense. Wheeler, in disagreement with the "authorities", expressed his opinion that the homicide was a senseless and racially motivated murder. Officer Upchurch sued.

By request for admission (App. 50-53), the defendants sought to establish that the sole bases for the plaintiff's action are his allegations (a) that Aaron Wheeler characterized as "murder" or as "senseless murder" the fatal shooting of Fred T. Gilchrist, III, by the plaintiff, Eddie Upchurch, and (b) that Aaron Wheeler insinuated that the shooting was racially motivated. In response (App. 54-55), the plaintiff admitted that Wheeler had made such statements but denied that they were the sole basis for the defamation action.

By interrogatory (App. 56), the defendants sought to determine what basis for the action exists except the foregoing allegations (a) and (b); and the answer to the interrogatory (App. 57) merely suggested that Wheeler and others "made numerous statements to newspaper reporters, television reporters, and radio reporters . . . characterizing an act of

self defense and an accidental shooting as 'murder'."

The newspaper articles, excerpts from which appear in the Appendix at pages 51-53, were submitted by the plaintiff with the Bill of Particulars and by reference they are incorporated into his Motion for Judgment. They reflect what was public information when Wheeler allegedly characterized the homicide as murder. Wheeler's conclusion was not in any way "ill-founded". The plaintiff contends that Wheeler's pure expression of opinion is actionable because it conflicts with the conclusions of the Police Department's homicide squad, the Police Department's internal affairs division, and with the Commonwealth Attorney's office (App. 42, et seq.; Motion for Judgment, paragraphs 7 through 12). In answering the interrogatory, the plaintiff complained: "The Defendants continued to

make these statements even after four investigations cleared the Plaintiff of any wrongdoing." (App. 56)

Since the earliest days of the Commonwealth, white Virginians have enjoyed the constitutional privilege of writing or speaking "any pure expression of opinion, not amounting to 'fighting words' * * * however ill-founded, without inhibition by actions for libel and slander. Chaves v. Johnson, supra. Before the federal Constitution was ordained and established, the citizens of Virginia had enshrined in their Bill of Rights "as the basis and foundation of government * * *

> "12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments."

Subsequent revisions have produced this further statement of privilege:

> "that any citizen may freely speak, write and publish his sentiments on

> all subjects, being responsible for the abuse of that right;

Constitution of Virginia, Article I, Section 12 (1971). With one exceptional circumstance next to be discussed, the right and duty of a citizen of Virginia to comment on the behavior of public servants have been and are yet considered as "one of the great bulwarks of liberty". A policeman's misuse of his gun concerns all of us!

Prior to the adoption of the Thirteenth Amendment, black persons, whether slave or free, were excluded from the rank of citizen of Virginia; and by custom and law they were denied freedom of the press or any other freedom which would be inconsistent with their subjugation. In its 1847-48 session, the General Assembly of Virginia added to its proscription of Offenses by Negroes the following:

> A negro shall be punished with stripes: First, if he use provoking language or menacing gestures to a white person; * * *

(Code of Virginia . . . 1860; Chapter CC-Offenses By Negroes, Section 11)

The petition for removal, at paragraph 9, alleged that the highest court of the State of Virginia tolerates the lingering viability of the 1847-48 proscription of a Negro's use of provoking language to a white person. It also charged that "the failure of the [state trial] court to rule whether Wheeler's assertions were fact or opinion subjects the petitioners to the onus of preparation and trial and to the risk of an adverse verdict and judgment, for having mad[e] pure expression of opinion, such as white citizens may freely make without inhibition by actions for libel and slander." (App. 33-34. Emphasis added).

Further, in paragraph 16, the petition for removal shows that "[b]ut for

such lingering viability of the 1847-48 legislation hereinabove mentioned, it is unlikely that the subject defamation action would have been brought; and its is certain that, if brought, it would have been summarily dismissed upon motion therefor and a showing that the action is predicated upon a pure expression of opinion, not amount to fighting words." (App. 38). Consistently with the spirit of that ante-bellum statute, the Supreme Court of Virginia rejected out of hand the claim of constitutional privilege asserted by a black real estate developer who had published his opinion that his white opponent in a zoning controversy "wants to deprive working people of the same opportunities Mr. Jefferson sought for them * * * [and] does not want any black people within his sight." Fleming I supra, (221 Va. at 881).

The facts in Chaves v. Johnson, supra, do not suggest analogy with the punishment of a Negro for using provoking language to or concerning a white person. In a letter to the members of the council of the City of Fredericksburg, Johnson, an architect, had charged (a) that his competitor, Chaves, "has had no prior experience in this type of project" and (2) that council had "agree[d] to pay [to Chaves] an Architectural fee that is over 50% more than what could be considered a reasonable fee." In Chaves' ensuant action for damages, the trial court set aside the verdict on the defamation count, "on the grounds that Johnson's statements were mere statements of opinion." (230 Va. at 118; 335 S.E.2d at 101).

That which was written and published by Fleming of and concerning Moore is more readily seen as pure expression of opinion than that which was written and published

by Johnson of and concerning Chaves. While one can only opine what another person "wants" or "does not want", a comparison of professional experience and professional fees can be objectively documented. The only basis for distinction between Chaves v. Johnson and Fleming I is that Fleming is a black man whose publication "provoked" a white university professor.

The Fleming cases illustrate the willingness of the state judiciary, notwithstanding the absence of charge or proof of special damages, to inflict financial ruin upon a black citizen whose only offense was to publish his opinions (1) that his white opponent in a zoning controversy wanted to deprive working people of the same opportunity which Thomas Jefferson had sought for them and (2) that his white opponent did not want any black people within his sight. In the

subsequent case of Chaves v. Johnson in which the litigants were white, the trial court held, and the appellate court agreed, that under the state and federal constitutions an architect was privileged to say that his competitor, to whom the city had awarded a construction contract, had less qualifying experience and, moreover, was charging 50% more than a reasonable fee. In Chaves, the court held:

> Pure expressions of opinion, not amounting to "fighting words," cannot form the basis of an action for defamation. The First Amendment to the Federal Constitution and article 1, section 12 of the Constitution of Virginia protect the right of the people to teach, preach, write, or speak any such opinion, however ill-founded, without inhibition by actions for libel and slander. "[E]rror of opinion may be tolerated where reason is left free to combat it." Thomas Jefferson's First Inaugural Address (1801). "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).

> It is for the court, not the jury, to determine as a matter of law whether an allegedly libellous statement is one of fact or one of opinion.

Chaves v. Johnson, 230 Va. at 119, 335 S.E.2d at 101-2).

But the court denied Fleming's timely filed petition for rehearing and for conformation of the judgment in his case to its then recent holding in Chaves.

B

Petitioners Have Been Denied AND They Cannot Enforce In State Court The Pertinent Equal Civil Right

Notwithstanding the absence of a discriminatory state enactment, "an equivalent basis" (Georgia v. Rachel, 384 U.S. 780, 804 (1966)) is shown here for an unavoidable and more significant finding that, solely by reason of race, the petitioners have been denied and cannot enforce in the courts of Virginia their right under 42 U.S.C. 1981 to the full and

equal benefit of Article 1, section 12 of the Constitution of Virginia.

By ruling that the motions for summary dismissal were "untimely", the state trial court denied these petitioners' civil right not to be "tried" for doing that which white citizens are constitutionally privileged to do without inhibition by actions for libel and slander" (Chaves v. Johnson, supra). When, as defamation defendants, they had demonstrated that the subject utterances were pure expression of opinion, the petitioners were entitled to relief from the inhibition of the pending action for libel. From the trial courts' denial of that relief, there was no appeal in

advance of trial and final judgment.[3] As was held in Georgia v. Rachel, at 805:

> "It is no answer in these circumstances that the defendants might eventually prevail in the state court. The burden of having to defend the prosecution is itself the denial of a right explicitly conferred by the Civil Rights Act".

The Civil Rights Act of 1866 (now embodied in 42 U.S.C. 1981) conferred on the recently freed slaves and their progeny "the same right . . . to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and [to] be subject to like punishment, pains, and penalties and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

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[3]In pertinent part, the controlling statute reads: "[A] person may present a petition for an appeal to the Supreme Court if he believes himself aggrieved * * * 3. By a final judgment in any other civil case; * * * (Code of Virginia, Section 8.01-670).

Citing Thomas Jefferson's First Inaugural Address and Gertz v. Robert Welch, Inc., 418 U.S. 323, 330-40 (1974), the Virginia court, in Chaves v. Johnson, supra, said:

> "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

Continuing, the Court held:

> It is for the court not the jury, to determine as a matter of law whether an allegedly libelous statement is one of fact or one of opinion.

On September 15, 1988 petitioners made application to the Supreme Court of Virginia for a writ of mandamus directing the trial court "to rule in advance of trial and as a matter of law, that the allegedly defamatory utterances [of Aaron Wheeler] are or are not pure expressions of opinion, privileged by Section 12 of Article I (Bill of Rights) of the Constitution of Virginia . . ." (App. 64, 65) The holding in Chaves v. Johnson,

supra, was cited. (App. 73-74). When on 20 September 1988, the court declined to issue the writ of mandamus (App. 75), there could no longer be any doubt of the inability of the petitioners to enforce in the courts of Virginia their right under the Civil Rights Act of 1866 to the equal benefit of Article I, section 12 of the Constitution of Virginia as construed in Chaves v. Johnson, supra. No longer could it be assumed (as suggested in Georgia v. Rachel at page 800 - cited by the district court at App. 17) that the state court "will redress the wrong".

III

In The Light Of The Fleming Cases (Petition For Certiorari Pending - No. 88-1979), Removal Is Appropriate Here

This petition for certiorari and Fleming's pending petition for certiorari (No. 88-1979) present two sides of the coin (The Civil Rights Act of 1866) which

was struck by the 39th Congress for the protection of black persons against unwarranted state court action. The petitioner, Virginia State Conference N.A.A.C.P., is one of the amici curiae who subscribed the brief in support of Fleming's petition. In the Fleming cases, the Court of Appeals for the Fourth Circuit has held that the Rooker-Feldman doctrine[4] precludes collateral attack on a state court's libel judgment, even though that judgment, itself, does violence to the Thirteenth Amendment and to the Civil Rights Act of 1866.

In the instant case, the Court of Appeals for the Fourth Circuit has held that, in advance of trial and judgment in the state court, petitioners may not remove this action which, like Fleming, is

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[4]Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

distinguishable from Chaves v. Johnson, supra, only on the basis of race.

It remains for this Court to say how and when, if at all, a black defendant can obtain federal protection of his equal right, under the Constitution of Virginia, to publish his opinion, however ill-founded, particularly in a matter of public concern, and to do so without inhibition by actions for libel and slander, even though a white person may be "provoked" thereby.

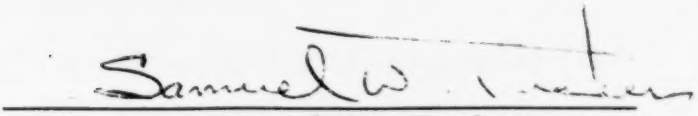
CONCLUSION

The promise of the Virginia Constitution to white citizens is that they may make any pure expression of opinion without inhibition by actions for libel and slander. The same freedom to black persons in Virginia is the commitment of the Nation. Petitioner prays that a writ of certiorari to the judgment of

the United States Court of Appeals for the Fourth Circuit will be granted.

VIRGINIA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Petitioner

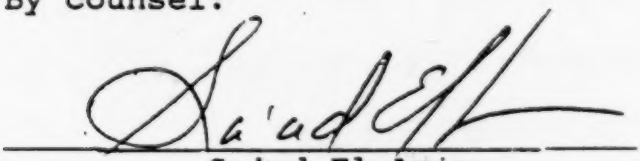
By counsel:



Samuel W. Tucker

AARON WHEELER, Petitioner

By counsel:



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CONTENTS OF APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2661

EDDIE UPCHURCH

Plaintiff-Appellee

v.

AARON WHEELER; VIRGINIA CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Defendants-Appellants

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr. United States District Judge. (CA-88-637-N).

Argued: May 12, 1989
Decided: July 6, 1989

Before RUSSELL and SPROUSE, Circuit Judges, and TURK, Chief Judge, United States District Court for the Western District of Virginia, sitting by designation.

Samuel Wilbert Tucker (HILL, TUCKER & MARSH; Sa'ad El Amin on brief) for Appellants. Kenneth W. Stolle (BENNETT & STOLLE, P.C. on brief) for Appellee.

PER CURIAM:

Aaron Wheeler and the Virginia Conference of the National Association for the Advancement of Colored People ("the NAACP") appeal from the district court's order remanding Upchurch's defamation suit against them back to Virginia state court. We agree with the district court that Wheeler and the NAACP cannot remove this case to federal court under 28 U.S.C. § 1443 and we affirm.

In June 1967, Upchurch, a white police officer employed by the City of Virginia Beach, shot and killed Fred T. Gilchrist, a twenty-two-year-old black man who was not armed. During press conferences, Wheeler, then the Chairman of the Legal Redress Committee of the Virginia Beach Branch of the NAACP, characterized the incident as "murder," and area newspapers printed his remarks. The following December, Upchurch brought an action against Wheeler and the NAACP,

claiming that Wheeler's remarks were false and defamatory and that Wheeler had actual knowledge of their falsity or acted with reckless disregard for the truth; Upchurch also alleged that the NAACP approved and accepted Wheeler's statements as its own remarks. The Virginia state court denied the motions of Wheeler and the NAACP for summary judgment as untimely. They then filed a petition for removal to the district court. The district court held that they could not remove the case and remanded it back to state court.

In their appeal to this court, Wheeler and the NAACP contend that they have an immediate right to remove this case to federal court under 28 U.S.C. § 1443. In their petition for removal and on appeal, they argue that

> solely by reason of race and color, and in violation of Title 42, United States Code, Section 1981, petitioners are denied and cannot enforce in the courts of the State of Virginia the right, under Article 1, Section 12 of the Constitution of Virginia . . ., to teach, preach,

> write, or speak any pure expression of opinion, however ill-founded, without inhibition by actions for libel and slander and the concomitant right to have the court, in advance of trial, determine as a matter of law whether the allegedly libelous statements are assertions of fact or expressions of opinion.

The core of their argument as expressed in their brief and during oral argument, is that a black person cannot receive a fair interpretation of the libel laws in the courts of Virginia in adversarial confrontations against a white person. They cite particularly the actions of the Virginia courts, including the Supreme Court of Virginia in Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981) and in Gazette, Inc. v. Harris, 229 Va. 1, 325 S.E.2d 713, cert. denied, 472 U.S. 1032 (1985).

As the district court pointed out in its order, the United States Supreme Court has devised a two-prong test to use in applying 28 U.S.C. § 1443:

> First it must appear that the right allegedly denied the removal

> petitioner arises under a federal law providing for specific civil rights stated in terms of racial equality . . .
>
> Second, it must appear . . . that the removal petitioner is denied or cannot enforce the specified federal rights in the courts of the State. This provision normally required that the denial be manifest in a formal expression of state law . . .

Johnson v. Mississippi, 421 U.S. 213, 219 (1975) (quotation marks, brackets, and citations omitted). The district court, in denying the petition for removal, ruled in a detailed and well-considered order that the defendant failed to meet the second prong of this test. The court stated in its order that Wheeler and the NAACP did not present "concrete evidence . . . to prove . . . that Virginia case law discriminates against black defendants in defamation cases or that [they] cannot enforce their civil rights in state courts." We affirm based on the district court's reasoning.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Filed: November 3, 1988

EDDIE UPCHURCH,

Plaintiff,

v. CIVIL ACTION NO. 88-637-N

AARON WHEELER, et al.,

Defendants.

ORDER

Aaron Wheeler and the Virginia Conference of the National Association for the Advancement of Colored People (NAACP) are defendants in a civil action brought by Eddie Upchurch on December 23, 1987 in the Circuit Court of the City of Virginia Beach. Plaintiff filed a Motion for Judgment claiming that defendant Wheeler (who is Chairman of the Legal Redress Committee of the Virginia Beach Branch of NAACP) made defamatory statements concerning the fatal shooting by Upchurch of a black youth. Plaintiff claims that defendant Wheeler knew these statements

were false or acted with reckless disregard of the truth.

Defendants filed a Motion for Bill of Particulars on January 19, 1988 which plaintiff responded to on January 28, 1988. Defendant NAACP filed a special plea in bar which was overruled and made discovery requests of plaintiff which were answered. Both defendants separately filed Motions for Summary Judgment pursuant to Rule 3:18 of the Rules of the Virginia Supreme Court. By letter dated August 16, 1988, Judge H. Calvin Spain denied both Motions as "untimely." Defendants then filed a Petition for Removal to the United States District Court for the Eastern District of Virginia on September 19, 1988 which was denied by this Court as untimely. On October 7, 1988 the defendants filed a "Motion to Reconsider and to Alter Judgment," claiming that the removal petition was timely under 28 U.S.C. § 1446(b). After

reconsideration, the Court finds no reason to change its prior ruling and therefore affirms that decision for the reasons stated below.

Removal to a federal court must be accomplished by a defendant within thirty days of receipt of the plaintiff's initial pleading under normal circumstances. However, 28 U.S.C. § 1446(b) allows for late removal

> If the case stated by the initial pleadings is not removable, a petition for removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

The instant case was not removable as originally filed, but defendants claim it became removable under 28 U.S.C. § 1443 by reason of Judge Spain's letter. Defendants further maintain that they filed their Petition within the time periods required by Section 1446(b) and Rule 6(a), Federal Rules of Civil

Procedure. Defendants' calculations appear to be correct on this point. Therefore, the questions to be considered are whether Judge Spain's letter constitutes "other paper" under 1446(b) and if so whether that letter brings this suit within the scope of Section 1443.

Defendants apparently claim that Judge Spain's letter constitutes "other paper" within the meaning of Section 1446(b) and that it makes clear for the first time the court's intent to deny defendants' civil rights, to enforce allegedly discriminatory decisions and to promote the policy of an outdated statute that is both offensive and unenforceable. Therefore, defendants believe this meets the requirements of 28 U.S.C. §1443 which provides for removal when a defendant's civil rights cannot be enforced in the state court.

Several cases suggest that the plaintiff must voluntarily act to amend

his complaint or provide the "other paper" that interposes a federal question and brings the case within the time extension provision of Section 1446(b). See Federal Deposit Insurance Corp. v. Otero, 598 F.2d 627, 629 (1st Cir. 1979); Winters Government Securities Corp. v. Cedar Point, 446 F. Supp. 1123, 1126 (S.D. Fla. 1978). However, some cases suggest that "Other paper" may emanate from the state proceeding if it is "not the product of the removing defendant's activity." Potter v. Carvel Stores of New York, Inc., 203 F. Supp. 462, 467 (D. Md. 1962), aff'd, 314 F.2d 45 (4th Cir. 1963). "other paper" has been construed by the courts to mean "documents generated within the state court litigation itself." Johansen v. Employee Benefit Claims, Inc., 668 F. Supp. 1294, 1296 (D. Minn. 1987). Therefore, the term "other paper" may be ambiguous enough to include the letter written by Judge Spain.

Even if the Court assumes for now that this letter constitutes "other paper," it must be paper "from which it may first ascertained that the case is one which is or has become removable." To be removable, the letter must bring the suit within the scope of Section 1443, since defendants do not claim that any other removal statutes are applicable. Section 1443(1) states:

> Any of the following civil actions or criminal prosecutions, commenced in a state court may be removed by the defendant to the district court of the United States . . .
>
> 1. Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof . . .

Defendants claim that 28 U.S.C. 1443(1) applies because:

> [Defendants] are denied and cannot enforce in the courts of the State of Virginia the right, under Article 1, Section 12 of the Constitution of Virginia, . . . "to teach, preach, write or speak any [pure expression of] opinion, however ill-founded, without inhibition by actions for

> libel and slander and the concomitant right to have the court in advance of trial, determine as a matter of law whether (the) allegedly libelous statement[s are assertions of fact or expressions] of opinion.

Defendants further claim that this right is protected by 42 U.S.C. § 1981 (which provides that all people "shall have the same right in every State . . . to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties . . . and to no other") and that various Virginia Supreme Court decisions "tolerate the lingering viability of the 1948-49 Act of the General Assembly of Virginia concerning offenses by Negroes . . . ." Apparently, defendants are arguing that by issuing the letter, Judge Spain indicated his intention to deprive defendants of their civil rights under Section 1981 by subjecting them to trial based on their

expressions of opinion, a trial that would not have occurred if defendants were white. Defendants have cited several cases that allegedly illustrate the unfair treatment black defendants receive in defamation suits when the plaintiff is white.

The United States Supreme Court has devised a two-prong test to be used when applying 28 U.S.C. §1443. The test is as follows:

> First it must appear that the right allegedly denied the removal petitioner arises under a federal law "providing for specific civil rights stated in terms of racial equality." Second, it must appear, . . . that the removal petitioner is "denied or cannot enforce" the specified federal rights "in the courts of the state." This provision normally requires that the "denial be manifest in a formal expression of state law" . . . .

Johnson v. Mississippi, 421 U.S. 213, 219 (1975).

In order to satisfy this test, defendants must demonstrate three things. First, by claiming that their rights under Section 1981 will be violated by Virginia

courts, defendants have satisfied prong one of the test because Section 1981 is considered to be a civil rights statute relating to racial equality. Greenwood v. Peacock, 384 U.S. 808, 825 (1965). Secondly, defendants must demonstrate that a state law or constitutional provision denies defendants' rights under Section 1981. Finally, defendants must show that Judge Spain's letter shows his intent to apply this discriminatory law.

Defendants' claims do not satisfy the second prong of the test. The Fourth Circuit, based on Supreme Court decisions, has held that in order to authorize removal, a court must be able to clearly predict that defendant's rights will be denied in the state court by operation of a state law or that the pendency of the prosecution itself will deprive defendant of a federally-protected right. See Frinks v. State of North Carolina, 468 F.2d 639, 643 (4th Cir. 1972), cert.

denied, 411 U.S. 920 (1973); State of South Carolina v. Moore, 447 F.2d 1067, 1070 (4th Cir. 1971). In one libel case, the defendant attempted removal to federal court which was denied since the defendant could cite no laws that immunized the publication of defamatory pamphlets so that the pendency of the suit itself did not prevent him from enforcing his civil rights. Noel v. McCain, 538 F.2d 633 (4th Cir. 1976). Similarly, defendants have cited no laws that protect them from being subjected to trial for allegedly making defamatory statements.

Further, defendants can point to no state law that discriminates in violation of Section 1981. Defendants recite a law from 1848-49 and imply that the Virginia courts still tolerate the viability of this law. To support this, defendants cite several defamation cases that they claim show discriminatory treatment of blacks in cases by white plaintiffs.

However, a careful reading of these cases indicates that they do not support defendants' propositions but merely present different factual situations with varying outcomes based on United States Supreme Court precedents. No concrete evidence has been presented by defendants to prove that the 1848-49 law noted above is still applied by Virginia courts, that Virginia case law discriminates against black defendants in defamation cases or that defendants cannot enforce their civil rights in state courts. Basically, defendants are claiming that they cannot receive a fair trial in Virginia because of the implications of the Judge's letter. However the Supreme Court has held that a state statute must deny defendant's rights before trial; an apprehension that the trial will be unfair based on past prejudices or case is not enough. Georgia v. Rachel, 384 U.S. 780, 798-9 (1966).

Finally, the letter by Judge Spain

does not indicate any intent to discriminate against blacks. It is merely a denial of summary judgment, which defendants may appeal. Even if the letter did evidence some type of prejudice on Judge Spain's part, the remedy would be to appeal within the Virginia Court system. If there is no formal state statute affirmatively denying defendants' rights, it is to be assumed that any unfairness in the trial will be corrected by the courts. Id. at 800.

In conclusion, defendants can cite no Virginia statutes or even successfully cite case law that shows that their civil rights under Section 1981 will not be protected in Virginia courts. The letter does not provide evidence of any intent to discriminate against defendants and if it did, the proper remedy would be appeal, not removal. Therefore, since the defendants have not satisfied the requirements of Section 1443(1), they

cannot take advantage of the time extension provision of Section 1446(b), and their Motion to Reconsider and to Alter Judgment is DENIED

The Clerk is DIRECTED to send a copy of this Order to counsel for the plaintiff and defendants.

IT IS SO ORDERED.

/s/ J. Calvitt Clarke, Jr.
United States District Judge

Norfolk, Virginia

November 3, 1988

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 88-2661

Filed July 6, 1989
U. S. Court of Appeals
Fourth Circuit

EDDIE UPCHURCH

Plaintiff - Appellee

v.

AARON WHEELER; VIRGINIA CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Defendants - Appellees

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ John M. Greacen
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

EDDIE UPCHURCH,

Plaintiff

v. CIVIL ACTION NO. 88-637-N

AARON WHEELER, et al.,

Defendants.

ORDER

The Court has reviewed the pleadings in this matter and has determined that the Petition for Removal filed by the defendants is not timely. 28 U.S.C. 1446(b). It is ORDERED that this matter be remanded to the Circuit Court of the City of Virginia Beach, Virginia.

The Clerk is DIRECTED to send a copy of this Order to counsel for the plaintiff and defendants.

/s/ J. Calvitt Clarke, Jr.
United States District Judge

Norfolk, Virginia

September 27, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

EDDIE UPCHURCH,	:	
	)	
Plaintiff,	:	
	)	CIVIL ACTION
v.	:	
	)	NO. 88-637-N
AARON WHEELER, et al.,	:	
	)	Filed:
Defendants.	:	Oct. 7, 1988

MOTION TO RECONSIDER AND TO ALTER JUDGMENT

The defendants move the court to reconsider its order dated 27 September 1988 and filed on 28 September 1988, holding that the Petition for Removal filed by the defendants is not timely and, accordingly, remanding the case to the Circuit Court of the City of Virginia Beach for trial. As grounds for their motion, the defendants say:

1. Petition for Removal was filed in the Clerk's Office of this Court at Richmond on (Monday) September 19th, 1988.

2. The case stated in the initial pleading was not removable.

3. By letter from court to counsel, dated 16 August 1988, mailed on 17 August, and received on 18 August by one attorney and on 19 August by the other attorney, the defendants were first informed that the case had become removable. (Petition for Removal 7).

4. The second paragraph of Subsection (b) of 28 U.S.C. § 1446 permitted the Petition for Removal to be filed within thirty days after receipt by the defendant of a paper from which it may first be ascertained that the case has become removable.

5. The thirtieth day after receipt of such information having been on (Saturday) 17 September or on (Sunday) 18 September, the Petition Removal, filed on (Monday) 19 September, was timely filed (F.R. Civ. Proc., Rule 6(a)).

6. Moreover, the defendants' absolute inability to enforce in the courts of the state his right under

Article I section 12 of the Constitution of Virginia to freely express any opinion, however ill-founded, without inhibition by actions for libel or slander, did not become certain until 20 September 1988, when the Supreme Court of Virginia denied the defendants' petition for a writ of mandamus ordering the Circuit Court of the City of Virginia Beach to rule, as a matter of law, whether the alleged utterances of Aaron Wheeler were statements of fact or expressions of opinion.

VIRGINIA STATE CONFERENCE OF
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
Defendants.

By: /s/ S. W. Tucker
Its Attorney

AARON WHEELER, Defendant

By: _____
His Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Eddie Upchurch,

Plaintiff

V.

JUDGMENT IN A CIVIL CASE

Aaron Wheeler and The Virginia Conference of the National Association for the Advancement of Colored People,

Defendants

CASE NUMBER: C/A 88-637-N

Jury Verdict. * * *

X Decision by Court. This action came for consideration before the Court. The issues have been decided and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion to reconsider and to alter judgment is DENIED.

Entered November 30, 1988
Nunc Pro Tunc November 3, 1988

Doris R. Casey, Clerk
Clerk

/s/ Vickie Love
(By) Deputy Clerk Vicki Love

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

EDDIE UPCHURCH,	:	
Complainant,	:	
vs.	:	C.A. NO. 88-0637-N
AARON WHEELER	:	
AND	:	
		Filed:
THE VIRGINIA CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,	:	Sept. 19, 1988
Defendants.	:	

PETITION FOR REMOVAL

To the Honorable Judges of the United States District Court for the Eastern District of Virginia -

The petition of The Virginia State Conference of the National Association for the Advancement of Colored People (hereinafter "Conference") and of Aaron Wheeler (sometimes hereinafter "Wheeler") respectfully shows:

1. On or about 23 December 1987 an action against petitioners for alleged

defamation was commenced in the Circuit Court of the City of Virginia Beach, in the State of Virginia, entitled Eddie Upchurch, plaintiff, vs. Aaron Wheeler and the Virginia Conference of the National Association for the Advancement of Colored People, defendants (At Law No. CL 87-2930). Photocopies of papers here material which have been filed or served, with identification as next shown, are attached.

Exhibit #1 - Notice of Motion for Judgment - issued on 6 January 1988

Exhibit #2 - Motion for Bill of Particulars - served by Conference on 19 January 1988

Exhibit #3 - Bill of Particulars-served by plaintiff on 28 January 1988

Exhibit #4 - Special Plea in Bar-filed by Conference on or about 9 February 1988

Exhibit #5 - Order [overruling Plea in Bar]-entered on_____ March 1988

Exhibit #6 - Request for

Admissions - served by Conference on 21 March 1988

Exhibit #7 - Answer to Request for Admissions - served by plaintiff on 13 April 1988

Exhibit #8 - Interrogatory - served by Conference on 21 March 1988

Exhibit #9 - Answer to Interrogatory - served by plaintiff on 13 April 1988

Exhibit #10 - Motion of Summary Judgment - filed by Wheeler on or about 2 April 1988

Exhibit #11 - Motion for Summary Judgment - filed by Conference on or about 7 June 1988

Exhibit #12 - Letter overruling Motions for Summary Judgment - dated 16 August; mailed 17 August; received by Wheeler's attorney on 18 August; received by attorney for Conference on 19 August 1988

Exhibit #13 - Sketch for order - submitted _____ September 1988

2. The gravamen of the motion of

judgment is that, as Chairman of the Legal Redress Committee of the Virginia Beach Branch of the National Association for the Advancement of Colored People, Wheeler in more than one press conference characterized as "murder" or as "senseless murder" the fatal shooting of a 24 year old black man by the plaintiff police officer (who is white) and insinuated that the shooting was racially motivated. The Conference is alleged to be vicariously liable for Wheeler's assertions. Wheeler is a black person.

3. Nowhere is there any suggestion that Aaron Wheeler was or ever claimed to have been or was believed to have been a witness to the homicide or to anything which led to the homicide. The Request for Admissions (Exhibit #6), the Answer thereto (Exhibit #7) the Interrogatory (Exhibit #8), the Answer thereto (Exhibit #9), and the newspaper articles submitted with the Bill of Particulars (Exhibit #3),

which by reference are incorporated into the Motion for Judgment (Exhibit #1), establish the context in which Wheeler is alleged to have characterized the fatal shooting by the plaintiff police officer as murder and to have insinuated that the killing was racially motivated, e.g.:

> "Upchurch [the instant plaintiff police officer] in his statement said he felt pressure on his gun, leading him to believe that Gilchrist was trying to take it.
>
> " 'In an effort to prevent that from happening' Sciortino [attorney for the Commonwealth] said, Upchurch 'grabbed his weapon and in the ensuing struggle he unintentionally discharged' the gun. The bullet struck Gilchrist in the chest. He fell to his knees and died.
>
> "Other witnesses, including the three youths, Turner and Maxine Gilchrist, said Fred Gilchrist's hand was not on Upchurch's gun.
>
> " 'No fingerprints other than those of Officer Upchurch were found on his weapon,' Sciortino said.
>
> "The medical examiner's findings 'tend to corroborate' witnesses' statements that the gun was 'intentionally fired,' Sciortino said.
>
> " 'In addition, the results of the gunshot residue test done on the

victim's hand do not support the assertion that the victim had his hand on the officer's gun at the time it was discharged,' Sciortino said."

(Request for admissions - Item 4; Quotations from newspaper).

4. In his Motion for Summary Judgment (Exhibit #10) the defendant Wheeler asserted:

a. The alleged statements attributed to the defendant as set forth in the motion for judgment constitute opinion, privileged under the First Amendment to the Constitution of the United States and Article I, Section 12 of the Constitution of Virginia.

b. The statements alleged to have been made by the defendant are not capable of defamatory meaning.

5. In its Motion for Summary Judgment (Exhibit #11), the Conference asserted:

i. The plaintiff's responses to the Request for Admission served on 21 March 1988 and to the Interrogatory served on 21 March 1988 establish that the sole bases for the plaintiff's action are his allegations:

(a) that Aaron Wheeler characterized as "murder" or as "senseless murder" the fatal shooting of Fred T. Gilchrist, III

by the plaintiff, Eddie Upchurch, and

(b) that Aaron Wheeler insinuated that the shooting was racially motivated.

ii. The alleged characterization of the fatal shooting of a citizen by a policeman as murder and the alleged disputation of the conclusion of the Commonwealth's Attorney that the homicide was an act of self defense and an accidental shooting are pure expressions of opinion not amounting to "fighting words" which, being privileged by the First Amendment to the Federal Constitution and by article 1, section 12 of the Constitution of Virginia, cannot form the basis of an action for defamation.

6. Essentially the same position had been asserted by the conference in its Special Plea in Bar; the evidentiary bases for which were the Motion for Judgment (Exhibit #1), the Motion for Bill of Particulars (Exhibit #2), the Bill of Particulars (Exhibit #3), and the failure of the plaintiff to respond to the express requests for reply to new matter alleged in the Special Plea in Bar (Exhibit #4) as, by Rule 3:12 of the Rules of the Supreme Court of Virginia, the plaintiff

was directed to do. The Honorable John K. Moore, Judge, who heard argument on the Special Plea in Bar and denied same, was not persuaded that the new matters stated in the Special Plea in Bar stood as admitted by the failure of the plaintiff to respond thereto.

7. By letter dated 16 Augus 1988, mailed on 17 August, received by Wheeler's attorney on 18 August by the Attorney for the Conference on 19 August 1988, the Honorable H. Calvin Spain, Judge, who on 9 August 1988 had heard the arguments of counsel, ruled that the Motions for Summary Judgment were "untimely" and for such reason would be denied.

8. The above described litigation is a civil action which may be removed to this court by the petitioners, defendants therein, pursuant to the provisions of Title 28, United States Code, Section 1443, in that, solely by reason of race and color, and in violation of Title 42,

United States Code, Section 1981, petitioners are denied and cannot enforce in the courts of the State of Virginia the right, under Article 1, Section 12 of the Constitution of Virginia, as construed in Chaves v. Johnson 230 Va. 112, 119, 335 S.E. 2d 97, 101-2 (1985), "to teach, preach, write, or speak any [pure expression of] opinion, however ill-founded, without inhibition by actions for libel and slander", and the concomitant right to have the court, in advance of trial, "determine as a matter of law whether [the] allegedly libelous statement[s are assertions] of fact or [expressions] of opinion". (Id.).

9. Notwithstanding the Thirteenth Amendment to the Constitution of the United States and Section 1981 of Title 42 of the United States Code, the courts of Virginia and, particularly, the highest court of the State of Virginia tolerate the lingering viability of the 1847-48 Act

of the General Assembly of Virginia, concerning Offenses By Negroes wherein, inter alia, it was ordained:

> "A negro shall by punished with stripes: First, if he use provoking language or menacing gestures to a white person."

Here, the failure of the court to rule whether Wheeler's assertions were fact or opinion subjects the petitioners to the onus of preparation and trial, and to the risk of an adverse verdict and judgment, for having mad__ pure expression of opinion, such as white citizens may freely make without inhibition by actions for libel and slander.

10. In Fleming v. Moore, 221 Va. 884, 275 S.E. 2d 632 (1981) (Fleming I) the Supreme Court of Virginia upheld the trial judge's denial of constitutional privilege to a black defendant's pure expression of opinion as to what was and what was not wanted by the white plaintiff who, for fourteen months, had actively opposed the defendant's applications for

re-zoning to permit housing for people of low and moderate income. The only justification offered by the appellate court for such holding was: "Since Fleming is not a media defendant and Moore is not a public figure, Gertz [v. Robert Welch, Inc., 418 U.S. 323 (1974)] does not control the present case." (221 Va. at 893, 275 S.E. 2d at 638).

11. Because the trial court had erroneously instructed the jury that Fleming's expression of opinion was libel per se, the Supreme Court of Virginia reversed. Noting, however, that under long established precedent Moore's failure to allege or prove monetary loss would bar recovery, the Supreme Court of Virginia "modified" its earlier holdings that emotional upset and embarrassment cannot constitute "special damages" (221 Va. at 894; 275 S.E. 2d at 639).

12. In allowing a second appeal, Fleming v. Moore, sub nom, The Gazette v.

Harris 229 Va. 1, 325 S.E. 2d 713 (1985) (Fleming II), the Supreme Court of Virginia, without any stated reason then given summarily rejected the assignments of error which presented questions of constitutional privilege. In deciding the second appeal it arbitrarily adhered to its earlier disposition of such questions. (229 Va. at 46).

13. In light of the jury awards which, by reason of their excessiveness, the court characterized as being "not the product of a fair and impartial decision" and "on its face indicat[ive of] prejudice or partiality", the Supreme Court of Virginia remanded in Fleming II for "substantial" remittitur or, at the option of the plaintiff, a new trial limited to the assessment of damages. The 1847-48 legislation on the subject of Offenses By Negroes limited the severity of punishment to thirty-nine (39) stripes at any one time.

14. Neither of the litigants in Chaves v. Johnson, supra, was black; and neither was either of the litigants in Great Coastal Express, Inc., v. Ellington 230 Va. 142, 334 S.E. 2d 846 (1985). Both cases were decided on September 15, 1986. In Great Coastal the court, without so saying, repudiated the tortured reasoning of its penultimate paragraph of Fleming I which had given the second jury license to punish Fleming for expressing his opinion and thereby provoking a white person.

15. By petitions for rehearing, timely filed following the denial of his third petition for appeal, Fleming asked the Supreme Court of Virginia to conform the final judgment in his case to the constitutional principles which then recently had been set forth in Chaves. Except for the difference in the race of the defendants, Fleming's case is indistinguishable from Chaves. Nevertheless, Fleming's 1985 petition for

rehearing was denied.

16. But for such lingering viability of the 1847-48 legislation hereinabove mentioned, it is unlikely that the subject defamation action would have been brought; and it is certain that, if brought, it would have been summarily dismissed upon motion therefor and a showing that the action is predicated upon a pure expression of opinion, not amounting to fighting words.

17. On 15 September 1988 the instant petitioners filed with the Supreme Court of Virginia their petition for a stay of the proceedings in the defamation action which is scheduled for trial on 21 September 1988 and for a writ of mandamus ordering the circuit judge to whom the action is or will be assigned to make a determination and, in advance of trial, to rule as a matter of law whether the alleged utterances of Aaron Wheeler were statements of fact or expressions of

opinion.

18. The thirteenth day after receipt by the defendants of the letter opinion of the Honorable H. Calvin Spain having been on Saturday, 17 September, or Sunday, 18 September, the petitioners are advised that this petition may not be filed later than this 19th day of September, 1988.

Wherefore, petitioners pray that the above action now pending against them in the Circuit Court of the City of Virginia Beach be removed therefrom to this court.

THE VIRGINIA STATE CONFERENCE OF NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Petitioner

By: /s/ S. W. Tucker ,
Its Attorney

AARON WHEELER, Petitioner

By: /s/ Sa-ad El'Amin ,
His attorney

[Verification Omitted]

VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF VIRGINIA BEACH

EDDIE UPCHURCH,

Complainant,

vs. No. CL 87-2930

AARON WHEELER
3206 Dunne Brook Court
Virginia Beach, VA 23456

AND

THE VIRGINIA CONFERENCE
OF THE NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF
COLORED PEOPLE
SERVE ANY OFFICER:
112 East Clay Street
Richmond, VA 23219

Defendants.

MOTION FOR JUDGMENT
[Filed December 23, 1987]

COMES NOW the Complainant, Eddie Upchurch, and respectfully alleges as follows:

1. Plaintiff is employed by the City of Virginia Beach as a police officer, and was so employed on June 20, 1987.

2. On or about June 20, 1987, while on duty, Officer Upchurch received a

call from the Police Dispatcher to assist Officer Audrey Turner with the apprehension of three juveniles for curfew violation and shoplifting.

3. After the apprehension of the three juveniles at the intersection of Independence and Buckner in Virginia Beach, Officer Eddie Upchurch and Officer Turner attempted to release the three juveniles into the custody of one Fred T. Gilchrist, III.

4. During the release of the three juveniles to Fred T. Gilchrist, III, Maxine Gilchrist became disorderly and was placed under arrest by Officer Turner.

5. During Maxine Gilchrist's arrest, Fred T. Gilchrist, III assaulted Officer Turner on several occasions in an attempt to free Maxine Gilchrist from the arrest.

6. On or about June 20, 1987, at approximately 2:00 a.m., Officer Eddie Upchurch attempted to arrest Fred T.

Gilchrist, III for assault on a police officer and interfering with the duties of a police officer. During this arrest, Fred T. Gilchrist, III attempted to take Officer Eddie Upchurch's service revolver from him. A struggle ensued over the service revolver, and the service revolver was discharged one time, killing Fred T. Gilchrist, III.

7. As a result of the shooting, the Virginia Beach Police Department's homicide squad, along with the Virginia Beach Police Department's internal affairs division and attorneys form the Virginia Beach Commonwealth Attorney's Office responded and initiated investigations into the shooting.

8. On or about June 24, 1987, Aaron Wheeler, Chairman of the Legal Redress Committee for the Virginia Beach Chapter of the National Association for the Advancement of Colored People called a press conference in which he characterized

the shooting of Fred T. Gilchrist, III as "murder" and called for Officer Eddie Upchurch's and Officer Audrey Turner's termination from the Virginia Beach Police Department. At the time Aaron Wheeler made these statements, he had actual knowledge that the statements were false.

9. Prior to making these statements, Aaron Wheeler had had conversations with members of the Virginia Beach Police Department and Robert Humphries of the Virginia Beach Commonwealth Attorney's Office. Both the Virginia Beach Police Department and the Commonwealth Attorney's Office had indicated to Mr. Wheeler that they were in the process of investigating the shooting and would share their investigation with Aaron Wheeler and the NAACP. Therefore, at the time Aaron Wheeler made these statements, he had actual knowledge that the investigations into the shooting had not been concluded, and his statements

were made with reckless disregard of the probable falsity.

10. On or about July 3, 1987, after Commonwealth's Attorney Paul A. Sciortino cleared Officer Eddie Upchurch of any criminal wrong-doing in the shooting of Fred T. Gilchrist, III, Aaron Wheeler, as Chairman of the Legal Redress Committee for the National Association for the Advancement of Colored People, called a press conference and again accused Officer Eddie Upchurch of murder, insinuated that the shooting was racially motivated, and threatened the City of Virginia Beach that if they did not fire Officer Eddie Upchurch, that the black community would take action. At the time Aaron Wheeler made these statements about Officer Upchurch on July 3, 1987, he was aware that the Commonwealth's Attorney's Office had made a thorough investigation into the shooting and had determined that there was no criminal wrong-doing on the part of

Officer Upchurch. Aaron Wheeler had actual knowledge that Officer Upchurch had not committed murder, and intentionally made these statements knowing them to be false.

11. On or about July 9, 1987, Garth Wheeler, President of the Fraternal Order of Police Lodge #8, called upon Aaron Wheeler to apologize for his verbal attacks on Officer Upchurch and to retract his statements. As a result of Garth Wheeler's request, Aaron Wheeler called a news conference in which he refused to retract his previous accusations and stated, "Hell will freeze over before I apologize over this incident for the shooting of that victim. People have called this a black and white incident, and trying to keep race out of this is difficult."

12. On or about September 10, 1987, the Virginia Beach Police Department released the results of their 3 1/2 month

investigation into the shooting of Fred T. Gilchrist, III by Officer Eddie Upchurch. Upchurch was cleared of any wrong-doing or violation of any departmental policies. As a result of this news release, Aaron Wheeler called another news conference in which he accused the Police Department of letting an injustice prevail and called upon the Mayor and the City Council to take another look at the incident and to dismiss the officer. Wheeler went on to indicate that if the Police Department refused to dismiss the officer, that the NAACP will take action on its own. At the time that Aaron Wheeler called this news conference, he had the results of three different investigations which indicted that Officer Upchurch had done nothing criminally wrong and had not violated any departmental policies. Aaron Wheeler had actual knowledge that the statements he was making were false and the sole purpose was to slander Officer Upchurch and the

Virginia Beach Police Department.

13. Aaron Wheeler made each of the foregoing statements to members of the local press, knowing or having reason to believe that each statement would be printed in the local newspapers or otherwise disseminated to the public.

14. On or about June 24, 1987, July 3, 1987, July 10, 1987, August 16, 1987, and September 10, 1987, the malicious and defamatory statements made by the Defendant were published in The Virginian-Pilot and Ledger Star newspapers and disseminated to the public.

15. At all times mentioned above Aaron Wheeler was acting as Chairman of the Legal Redress Committee for the Virginia Beach Chapter of the State of Virginia and National Association for the Advancement of Colored People, herein before referred to as the NAACP.

16. The remarks made by the Defendant Aaron Wheeler were made with

knowledge of their falsity and were made intentionally, maliciously and with the express intent to cause harm and damage to the Plaintiff.

17. At all times mentioned above, the NAACP was aware of the statements made by Wheeler, was aware of the results of the investigations which exonerated the Plaintiff yet did nothing to cause Wheeler to retract his said statements or set the record straight or offer any public or private apology to the Plaintiff. On the contrary, the NAACP approved and tacitly accepted as its own remarks, the defamatory remarks made to the press by its representative, Aaron Wheeler.

18. As a direct result of the malicious defamatory statements that the Defendant made with actual knowledge of their falsity, the Plaintiff was deprived of income in the form of wages and other benefits. Plaintiff has also suffered damage to his reputation and standing in

the community, embarrassment, humiliation and mental suffering.

WHEREFORE, Plaintiff respectfully prays this Court to award Plaintiff the following:

1. Compensatory damages from each Defendant, jointly and severally, for lost wages, benefits, damage to his reputation and standing in the community, embarrassment, humiliation and mental suffering, in the amount of $1,000,000.00.

2. Punitive damages from each Defendant, jointly and severally, for the defamatory statements made intentionally, maliciously, and with the express intent to cause harm and damage to the Plaintiff, in the amount of $1,000,000.00.

3. Grant such additional relief as the Court deems proper.

Plaintiff requests a trial by jury.

EDDIE UPCHURCH

/s/ Kenneth W. Stolle

* * *

REQUEST FOR ADMISSION
[Served 21 March 1988]

Pursuant to Rule 4:11, of the Rules of the Supreme Court of Virginia, the defendant Virginia State Conference of the National Association for the Advancement of Colored People requests the plaintiff to admit the following, within twenty-one days after service:

1. The sole bases for the plaintiff's action are his allegations:

(a) that Aaron Wheeler characterized as "murder" or as "senseless murder" the fatal shooting of Fred T. Gilchrist, III, by the plaintiff, Eddie Upchurch, and

(b) that Aaron Wheeler insinuated that the shooting was racially motivated.

2. As reported in The Virginian-Pilot for June 24, 1987 and as, by reference to that report, is incorporated into paragraph 8 of the Motion for Judgment, the alleged characterization of

the homicide as murder was in this context:

> "At that point Fred Gilchrist came out and told police to leave his sister alone, Wheeler said, and began wrestling with a police officer. Wheeler did not specify which officer.
>
> "Gilchrist's sister than allegedly shouted, 'Don't shoot my brother!'
>
> "Wheeler said that, at that point, Upchurch had his gun drawn and fired at Gilchrist, who fell to his knees and then to his face. He died moments later.
>
> "'This is a senseless murder, and something has to be done about it', Wheeler charged."

3. As reported in The Virginian-Pilot for July 3, 1987 and as, by reference to that report, is incorporated into paragraph 10 of the Motion for Judgment, the alleged characterization of the homicide as murder was in this context:

> "Wheeler, invoking harsh language that he had once used but later toned down, again called the shooting 'murder'.
>
> "'Gilchrist did not touch the gun,' Wheeler said. 'It showed he was murdered by the police officer. And

I'm going to use that word. Murder. It was brought out that he did not touch that gun. There was no powder in his hands. No fingerprints on the gun."

4. The context in which the characterization of the homicide as murder was allegedly made is further revealed by subsequent paragraphs of the last cited newspaper article, viz:

"Upchurch [the instant plaintiff police officer] in his statement said he felt pressure on his gun, leading him to believe that Gilchrist was trying to take it.

"'In an effort to prevent that from happening' Sciortino [attorney for the Commonwealth] said, Upchurch 'grabbed his weapon and in the ensuing struggle he unintentionally discharged' the gun. The bullet struck Gilchrist in the chest. He fell to his knees and died.

"Other witnesses, including the three youths, Turner and Maxine Gilchrist, said Fred Gilchrist's hand was not on Upchurch's gun.

"'No fingerprints other than those of Officer Upchurch were found on his weapon,' Sciortino said.

"The medical examiner's findings 'tend to corroborate' witnesses' statements that the gun was 'intentionally fired,' Sciortino said.

"'In addition, the results of the gunshot residue test done on the victim's hand do not support the assertion that the victim had his hand on the officer's gun at the time it was discharged,' Sciortino said.

5. The alleged insinuation that the fatal shooting was racially motivated would be an expression of opinion rather than a statement of fact.

VIRGINIA STATE CONFERENCE OF
THE NATIONAL ASSOCIATION FOR
FOR THE ADVANCEMENT OF
COLORED PEOPLE, Defendant

By: /s/ S. W. Tucker

* * *

PLAINTIFF'S ANSWER TO DEFENDANTS' REQUEST FOR ADMISSIONS
[Served 13 April 1988]

COMES NOW the Plaintiff, Eddie Upchurch, by counsel, and for his answers to Defendants' Request for Admissions states as follows:

1. Plaintiff denies that Aaron Wheeler's characterization of the fatal shooting as "murder" was "senseless

murder", or Aaron Wheeler's insinuation that the shooting was racially motivated, are the sole basis for his action against the Defendants.

2. Plaintiff admits that Aaron Wheeler made these statements, but denies that these statements are the sole basis for his action against the Defendants.

3. Plaintiff admits that Aaron Wheeler made these statements but denies that these statements are the sole basis for his action against the Defendants.

4. Plaintiff admits that the Defendant made these allegations, but denies that these statements are the sole basis for his action against the Defendants.

5. Plaintiff denies that Aaron Wheeler's statements indicating that the shooting was racially motivated was an expression of opinion.

EDDIE UPCHURCH

/s/ Eddie Upchurch

Subscribed and sworn to before me by Eddie Upchurch this 13th day of April, 1988.

My Commission Expires:
November 13, 1988

/s/ Louise S. Clarke
Notary Public

* * *

I N T E R R O G A T O R Y
[Served 21 March 1988]

Pursuant to Rule 4:8 of the Rules of the Supreme Court of Virginia, the defendant Virginia State Conference of the National Association for the Advancement of colored People hereby requests that the plaintiff, Eddie Upchurch, serve upon counsel for this defendant, within 21 days, his answer under oath to the following interrogatory:

1. What basis for this action is there, other than the plaintiff's allegations (a) that Aaron Wheeler characterized as "murder" or as "senseless murder" the fatal shooting of Fred T.

Gilchrist, III, by the plaintiff, Eddie Upchurch, and (b) that Aaron Wheeler insinuated that he shooting was racially motivated?

VIRGINIA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Defendant

By: /s/ S. W. Tucker

* * *

ANSWER TO INTERROGATORY
[Served 13 April 1988]

1. The Defendants Aaron Wheeler and representatives of the State Chapter of the N.A.A.C.P. made numerous statements to newspaper reporters, television reporters, and radio reporters from June of 1987, until the present date, characterizing an act of self-defense and an accidental shooting as "murder". The Defendants continued to make these statements even after four investigations cleared the Plaintiff of any wrong-doing

in the accidental shooting. The statements made by the Defendants were made with actual knowledge of their falsity and total disregard for he truth, and injured the Plaintiff as set forth in the Motion for Judgment. The statements contained in sections (a) and (b) of the Defendants' Interrogatory 1. only represents statements made by the Defendant Aaron Wheeler on two occasions.

EDDIE UPCHURCH

/s/ Eddie Upchurch

Subscribed and sworn to before me this 13th day of April, 1988, by Eddie Upchurch.

My Commission Expires:
November 13, 1988

/s/ Laura S. Clarke
Notary Public

* * *

MOTION FOR SUMMARY JUDGMENT OF
AARON WHEELER
[Filed April 1988]

Pursuant to Rule 3:18 of the Rules of the Supreme Court of Virginia,

defendant Aaron Wheeler moves that this Court enter summary judgment in his favor on the following grounds:

1. The alleged statements attributed to the defendant as set forth in the motion for judgment constitute opinion, privileged under the First Amendment to the Constitution of the United States and Article I, Section 12 of the Constitution of Virginia.

2. The statements alleged to have been made by the defendant are not capable of defamatory meaning.

Respectfully submitted,

AARON WHEELER

By /s/ Sa'ad El-Amin
Of Counsel

Sa'ad El-Amin, Esquire
EL-AMIN & CARR
312 West Grace Street
Richmond, Virginia 23220
(804) 643-0123

* * *

MOTION OF DEFENDANT
VIRGINIA STATE CONFERENCE N.A.A.C.P.
FOR SUMMARY JUDGMENT
[Filed June 1988]

The defendant Virginia State Conference of the National Association for the Advancement of Colored People moves the court to enter summary judgment for the defendants and to dismiss the plaintiff's action with prejudice.

I

The plaintiff's responses to the Request for Admission served on 21 March 1988 and to the Interrogatory served on 21 March 1988 establish that the sole bases for the plaintiff's action are his allegations:

(a) that Aaron Wheeler characterized as "murder" or as senseless murder" the fatal shooting of Fred T. Gilchrist, III, by the plaintiff, Eddie Upchurch, and

(b) that Aaron Wheeler insinuated that the shooting was racially motivated.

In his answer to the request for admission (herewith filed), the plaintiff denies that these statements are the sole basis for the pending action. Yet, in response to the interrogatory (herewith filed) that he state what other basis there is for his action, the plaintiff says merely that the defendants made and continued to make numerous statements characterizing the homicide as murder.

II

The alleged characterization of the fatal shooting of a citizen by a policeman as murder and the alleged disputation of the conclusion of the Commonwealth's Attorney that the homicide was an act of self defense and an accidental shooting are pure expressions of opinion not amounting to "fighting words" which, being privileged by the First Amendment to the Federal Constitution and by article 1, section 12 of the Constitution of Virginia, cannot form the basis of an

action for defamation. As was said in Chaves v. Johnson, 230 Va. 112, 119, 335 S.E.2d 97, 101-2 (1985), "It is for the court, not the jury, to determine as a matter of law whether an allegedly libellous statement is one of fact or one of opinion."

VIRGINIA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Defendant

By: /s/ S. W. Tucker

COMMONWEALTH OF VIRGINIA

SECOND JUDICIAL CIRCUIT

*** ***

August 16, 1988

C/A-88-637-N

Kenneth W. Stolle, Esquire
Suite 202, Parkway Two
2697 International Parkway
Virginia Beach, VA 23452

S. W. Tucker, Esquire
Post Office Box 27363
Richmond, VA 23261-7363

Sa'ad El-Amin, Esquire
312 W. Grace Street
Richmond, VA 23220

Richard G. Brydges, Esquire
Post Office Box 625
Virginia Beach, VA 23451

Re: Eddie Upchurch v. Aaron Wheeler, et al
Chancery No. CL87-2930

Gentlemen:

I have reviewed my notes in the above-captioned matter, the Memorandum of Law filed in support of the Wheeler Motion for Summary Judgment, and the various citations. The Court is of the opinion that the Motions for Summary Judgment filed by Aaron Wheeler and the Virginia State Conference of the NAACP are untimely, and therefore denies the motions.

Accordingly, Mr. Stolle should prepare an order with respect to the

Court's holdings.

With the kindest of personal regards, I remain

Sincerely,

/s/ H. Calvin Spain
H. Calvin Spain

HCS/ed

* * *

O R D E R

THIS CAUSE came on this day, Tuesay, August 9, 1988 upon motion filed by counsel for the Defendants, and this matter was argued by counsel.

Upon consideration whereof it is ADJUDGED, ORDERED and DECREED that the Defendants motions for summary judgment is untimely and therefore denied.

ENTERED: 9/29/88

/s/ H. C. S.
Judge

* * *

A Copy Teste: J. Curtis Fruit, Clerk
By /s/ Barbara S. Murden, D.C.

IN THE SUPREME COURT OF VIRGINIA

In re: Virginia State Conference of the National Association for the Advancement of Colored People and Aaron Wheeler, Petitioners

P E T I T I O N

For Stay of Trial

Scheduled For 21 September 1988

And

F O R W R I T O F M A N D A M U S

[Filed: Sept. 15, 1988]

To the Honorable Justices of the said Court:

Petitioners, Virginia State Conference of National Association for the Advancement of Colored People and Aaron Wheeler, seek a writ of mandamus ordering the Honorable H. Calvin Spain, Judge of the Circuit Court of the City of Virginia Beach, in an action for defamation therein pending (styled Eddie Upchurch, plaintiff, vs. Aaron Wheeler and Virginia State Conference of the National Association for the Advancement of Colored People, defendants) to rule in advance of trial

and as a matter of law, that the allegedly defamatory utterance and writings are or are not pure expressions of opinion, privileged by Section 12 of Article I (Bill of Rights) of the Constitution of Virginia and by the First and Fourteenth Amendments to the Constitution of the United States.

THE PROCEEDINGS IN THE CIRCUIT COURT

1. The plaintiff in the defamation action is a policeman for the City of Virginia Beach who is white; and he sometimes hereinafter will be referred to as "Upchurch" or as "the policeman". The defendants in the defamation action (here the petitioners) are (1) Aaron Wheeler (a citizen of the United States residing in the City of Virginia Beach), who is black and who sometimes, hereinafter will be referred to as "Wheeler", and (2) Virginia State Conference of the National Association for the Advancement of Colored People (an unincorporated association)

which sometimes hereinafter will be referred to as "Conference". The Conference is alleged to be vicariously liable for statements made by Wheeler.

2. At or about 2:00 a.m. on 20 June 1987 and while on duty in the City of Virginia Beach, Officer Upchurch shot and killed a 22 year old black man named Fred T. Gilchrist, III.

3. Responding to the Motion for Judgment (Exhibit 1) as amplified by the Bill of Particulars (Exhibit 2), the Conference on or about 10 February 1988 filed a Special Plea in Bar (Exhibit 3) which, by reason of express requests for reply pursuant to Rule 3:12 remaining unanswered, is deemed by the Conference to have established inter alia that the sole bases for the policeman's defamation action are his allegations (a) that Wheeler characterized as "murder" or "a senseless murder" the fatal shooting of Gilchrist, by the policeman and (b) that

Wheeler has insinuated that the shooting was racially motivated. The plea asserted that the alleged statements and insinuation where pure expressions of opinion "which are absolutely privileged under Section 12 of the Constitution of Virginia and, also, under the First Amendment to the Constitution of the United States as it is made applicable to the States by the Fourteenth Amendment".

4. The Special Plea in bar was overruled by order entered by the Honorable John K. Moore, Judge (Exhibit 4); and the Conference was allowed to file a responsive pleading by April 7, 1988. Saving its exception, the Conference adopted as its First Defense in its Grounds of Defense each and every matter stated in the Special Plea in Bar as fully as if that plea were set out . . . verbatim." (Exhibit 5)

5. By Request for Admissions (Exhibit 6), the Conference sought to

establish the factual matters which it had deemed established by the plaintiff's failure to respond, as requested, to the several allegations in the Special Plea in Bar, e.g., what other allegedly defamatory statement, if any, is charged or known to have been made by Aaron Wheeler. In answering the Request for Admissions, the plaintiff declined to admit that the sole bases for his action where Wheeler's characterization of the shooting as "murder" or "senseless murder" and his insinuations that the shooting was racially motivated.

6. Anticipating such refusal to admit, the Conference by Interrogatory (Exhibit 7) required the plaintiff to state what other utterances were bases for the defamation action. In answering, the plaintiff did not show any other utterance but merely indicated that on numerous occasions Wheeler had characterized the fatal shooting as "murder".

7. On or about 6 June 1988 the Conference filed its Motion for Summary Judgment (Exhibit 8) for the Defendants; asserting in Section II thereof as follows:

> The alleged characterization of the fatal shooting of a citizen by a policeman as murder and the alleged disputation of the conclusion of the Commonwealth's attorney that the homicide was an act of self defense and an accidental shooting are pure expressions of opinion not amounting to "fighting words" which, being privileged by the First Amendment to the Federal Constitution and by article 1 , Section 12 of the Constitution of Virginia, cannot form the basis of an action for defamation. As was said in Chaves v. Johnson, 230 Va. 112, 119, 335 S.E.2d 97, 101-2 (1985), "It is for the court, not the jury, to determine as a matter of law whether an allegedly libellous statement is one of fact or one of opinion."

8. Process was served on Aaron Wheeler on or about March 11, 1988 and thereupon, in addition to his grounds of defense (Exhibit 13), he filed a Motion for Summary Judgment (Exhibit 9) asserting -

(1) The alleged statements

attributed to the defendant set forth in the motion for judgment constitute opinion, privileged under the First Amendment to the Constitution of the United States and Article I, Section 12 of the Constitution of Virginia.

(2) The statements alleged to have been made by the defendant are not capable of defamatory meaning.

9. Counsel for Wheeler also filed a memorandum in support of the motion for summary judgment (Exhibit 10). No memorandum was filed by or on behalf of the plaintiff.

10. After hearing oral argument on 9 August 1988, the Honorable H. Calvin Spain under date of 16 August (Exhibit 14) informed counsel that the motions for summary judgment were "untimely" and, therefore, were denied. The Order accordingly was or will be entered on September ___, 1988. (Exhibit 15)

11. The case is set to be tried on

the merits on 21 September 1988.

THE FACTS

12. The facts pertinent to this proceeding are established by the failure of the plaintiff to respond, as requested, to matters alleged in the Special Plea in Bar and (2) by the plaintiff's responses or lack of responses to the Request for Admissions (Exhibit 11) and to the Interrogatory (Exhibit 12). Facts thus established include the following:

a. The sole bases for the plaintiff's action are his allegations:

(1) that Aaron Wheeler characterized as "murder or as "senseless murder" the fatal shooting of Fred T. Gilchrist, III, by the plaintiff, Eddie Upchurch, and

(2) that Aaron Wheeler insinuated that the shooting was racially motivated.

b. The context in which the characterization of the homicide as murder

was allegedly made is revealed by one of the newspaper articles which by reference is incorporated into the motion of judgment, viz:

> "Upchurch [the instant plaintiff police officer] in his statement said he felt pressure on his gun, leading him to believe that Gilchrist was trying to take it.
>
> "'In an effort to prevent that from happening' Sciortino [attorney for the Commonwealth] said, Upchurch 'grabbed his weapon and in the ensuing struggle he unintentionally discharged' the gun. The bullet struck Gilchirst in the chest. He fell to his knees and died.
>
> "Other witnesses, including the three youths, Turner and Maxine Gilchrist, said Fred Gilchrist's hand was not on Upchurch's gun.
>
> "'No fingerprints other than those of Officer Upchurch were found on his weapon,' Sciortino said.
>
> "The medical examiner's findings 'tend to corroborate' witnesses' statements that the gun was 'intentionally fired,' Sciortino said.
>
> "'In addition, the results of the gunshot residue test done on the victim's hand do not support the assertion that the victim had his hand on the officer's gun at the time it was discharged,' Sciortino said."

c. The alleged insinuation that the fatal shooting was racially motivated would be an expression of opinion rather than a statement of fact.

13. In the opinion of the Petitioners, the taking of evidence is not necessary for the proper disposition of this application.

SUMMARY OF THE ARGUMENT

14. If, as petitioners contend, Aaron Wheeler merely expressed his opinion that the evidence as reported in the newspaper did not warrant the reported opinion and conclusions of the Commonwealth's attorney, the utterances, even if "ill-founded" (which they are not), were privileged under Section 12 of Article I (Bill of Rights) of the Constitution of Virginia and under the First and Fourteenth Amendments to the Constitution of the United States. "It is for the court not the jury, to determine as a matter of law whether an allegedly

libelous statement is one of fact or one of opinion." Chavis v. Johnson, 230 Va. 112, 119, 335 S.E. 2d. 97, 101-2 (1985).

15. Wheeler had a right "without inhibition by actions for libel and slander" to disagree in the press with the opinion of the Commonwealth's Attorney as reported in the press. If the petitioners are entitled to a termination of the action for alleged defamation, then freedom of speech and of the press should not be chilled by the burden of preparing for trial and the risk of a verdict tainted by prejudice and partiality.

CONCLUSION - RELIEF SOUGHT

16. Petitioners pray that this Court will order a stay of the proceedings in said defamation action and that the Judge of the Circuit Court of the City of Virginia Beach to whom the action is or will be assigned will be ordered to make a determination and, in advance of trial, to rule as a matter of law whether the

alleged utterances of Aaron Wheeler were statements of fact or expressions of opinion.

VIRGINIA STATE CONFERENCE OF
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
Petitioner

By: /s/ S. W. Tucker, its attorney

AARON WHEELER, Petitioner

By:/s/ Sa'ad El-Amin, his attorney

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 20th day of September, 1988.

In Re: Virginia State Conference of the National Association for the Advancement of Colored People and Aaron Wheeler, Petitioners

Record No. 881026

Upon a Petition for a Writ of Mandamus

On consideration of the petition of the Virginia State Conference of the

National Association for the Advancement of Colored People and Aaron Wheeler praying that a writ of mandamus to forthwith issue, to be directed to the Honorable H. Calvin Spain, Judge of the Circuit Court of the City of Virginia Beach, and the motion for dismissal filed by the respondent, the Court is of opinion that the writ of mandamus should not issue as prayed for. It is therefore ordered that the said petition be dismissed and that the respondent recover of the petitioners his costs by him expended about his defense herein.

A Copy,

Teste:

David B. Beach, Clerk